

SOAH DOCKET NO. 582-20-1895
TCEQ DOCKET NO. 2019-1156-IWD

APPLICATION OF	§	BEFORE THE STATE OFFICE
PORT OF CORPUS CHRISTI	§	
AUTHORITY OF NUECES	§	
COUNTY FOR TEXAS	§	OF
POLLUTANT DISCHARGE	§	
ELIMINATION SYSTEM	§	
PERMIT NO. WQ0005253000	§	ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR'S OBJECTIONS TO PREFILED TESTIMONY

To the Honorable Administrative Law Judges Smith and Quinn:

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) and files this, his objection to the Prefiled Testimony of Port Aransas Conservancy.

In remanding the application to the State Office of Administrative Hearings (SOAH) the Commission referred six issues:

Issue A: Whether the proposed discharge will adversely impact: the marine environment, aquatic life, and wildlife, including birds and endangered species, spawning eggs, or larval migration;

Issue C: Whether the proposed discharge will adversely impact recreation activities, commercial fishing, or fisheries in Corpus Christi Bay and the ship channel;

Issue D: Whether the Application, and representations contained therein, are complete and accurate;

Issue G: Whether the modeling complies with applicable regulations to ensure the draft permit is protective of water quality, including using accurate inputs;

Issue H: Whether the Executive Director's antidegradation review was accurate; and

Issue I: Whether the draft permit includes all appropriate and necessary requirements.

As noted by PAC and the ALJs, the Commission limited the scope of the contested case hearing on remand to the issues listed above. All other issues are

irrelevant to the contested case hearing are and not admissible under Texas Rules of Evidence 401, 402 and 30 TAC § 80.127(a).

A: Testimony regarding communications between the United States Environmental Protection Agency (EPA) and TCEQ.

As noted by both Counsel for PAC and the ALJs, the scope of the remand hearing is limited to the issues referred by the Commission. The Commission did not refer any issues that are even tangentially relevant to any communication the TCEQ may have had with the EPA. Thus, it indisputably follows that none of the communications between the EPA and TCEQ are relevant to the POCC hearing on remand and must therefore be excluded from the record of the contested case hearing.

Relevant evidence must make a fact more or less probable than it would be without the evidence and be of consequence in determining the action. Tex. R. Evid. 401. Because the Commission did not refer the issue of whether EPA reviewed the POCC application or should have reviewed the POCC application, none of the testimony regarding EPA's action or inaction is of consequence to this case.

Specifically, the Executive Director objects to the following testimony regarding communication between the EPA and TCEQ because it is not relevant to the issues referred by the Commission.

Exhibit No.	From (Page:Line)	Through (Page:Line)	Basis for Objection
PAC-50R	10:11	11:6	Relevance
PAC56-R 2021_11	Exhibit 8	--	Entirety of EPA Letter dated 9/20/21 - Relevance
PAC 58R	--	--	Entirety of Document - Relevance
PAC 59R	--	--	Entirety of Document - Relevance
PAC 63R	5:12	5:12	Relevance

B: Testimony regarding toxicity testing procedures and the resulting data that does not comply with Texas Water Code § 5.134.

Dr. Nielson testified extensively regarding toxicity testing that she performed on the early life stage of red drum. The Executive Director objects to all of Dr. Nielson's testimony regarding the toxicity testing procedures she used, the results of the toxicity

testing, her opinions regarding the results of the toxicity and all testimony of other experts that relied on Dr. Nielson's toxicity testing.

TWC § 5.134 requires that all environmental testing laboratory data and analysis used by the commission for decisions under the Commission's jurisdiction must be from an accredited environmental testing laboratory. Additionally, TWC §§ 5.801 – 5.806 provide the framework for the Commission's accreditation of environmental testing laboratories. The preamble to the rules implementing TWC §§ 5.134 and 5.801 – 5.826 explain that the Sunset Advisory Staff Report indicated that requiring all data used in Commission decisions be from an accredited laboratory "should increase confidence in agency decision making, providing greater assurance of protecting public health, and minimize unnecessary cost for the agency."¹ Dr. Nielson did not testify that her laboratory is accredited by the TCEQ, nor is it on the list of accredited laboratories available at:

https://www.tceq.texas.gov/agency/qa/env_lab_accreditation.html.

Mr. Pfeil testified that he is aware of the requirement that all data used in commission decisions must be from an accredited laboratory. (ED-MP-1 Remand).

Additionally, Dr. Neilson used red drum, which is not a species EPA requires (or even allows) TCEQ to use in evaluating a TPDES permit, thus neither the ALJs nor the TCEQ can rely on Dr. Neilson's results. Michael Pfeil, the Executive Director's expert in toxicity testing, testified the only EPA Region 6 approved species for salt water are the mysid shrimp (*Mysidopsis bahia*) and the inland silverside (*Menidia beryllina*). (ED-MP-1 Remand). Mr. Pfeil also testified that he could not add testing for other species because there is no standardized WET testing methodology. (ED-MP-1 Remand, 6:18-19)

The Texas Supreme Court considered the admission of expert testimony in *E.I. duPont de Nemours and Company, Inc. v. C.R. Robinson and Shirley Robinson*, (38 Tex. Sup. Ct. J. 852; 923 S.W.2d 549). Relying on the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90, and the Texas Court of Criminal Appeals decision in *Kelly v. State*, 824 S.W. 2d 568 (Tex. Crim. App. 1992), the court held that expert testimony must be both relevant and reliable (*id.* at

¹ 24 Tex.Reg. 8480, Referencing Sunset Advisory Commission Staff Report, Texas Natural Resource Conservation Commission, 2000, Page 54.

557). Relevant evidence is evidence that “has any tendency to make a fact more or less probable that it would be without the evidence; and the fact is of consequence in determining the action.” Tex. R. Evid. 401. Because Dr. Neilson’s laboratory is not an accredited laboratory, any evidence based on the results of Dr. Neilson’s experiments, is inadmissible. By extension, Dr. Neilson’s testimony as well as the testimony of other witnesses who relied on Dr. Neilson’s are not relevant to the Commission’s decision regarding the application by the Port of Corpus Christi. The Executive Director objects to all of Dr. Nielson’s testimony regarding the toxicity testing procedures she used, the results of the toxicity testing, her opinions regarding the results of the toxicity and all testimony of other experts that relied on Dr. Nielson’s toxicity testing.

Because of the importance the Texas Legislature placed on all data used in Commission decisions be from an accredited laboratory, and because Dr. Neilson’s laboratory is not an accredited laboratory, the Executive Director objects to all testimony from all witnesses regarding Dr. Neilson’s toxicity testing as irrelevant.

Specifically, the Executive Director objects to the following testimony:

Exhibit No.	From (Page:Line)	Through (Page:Line)
PAC-48R Remand	12:3	17:21
PAC-48R Remand	18:16	19:2
PAC-48R Remand	20:10	20:15
PAC-48R KN-2	Entire Document	
PAC-48R KN-3	Entire Document	
PAC 48R KN 4	Entire Document	
PAC-50R	15:20	16:16
PAC-50R	18:4	18:7
PAC-50R	20:21	20:25
PAC-50R	21:6	21:11
PAC-45R	4:16	4:28

Exhibit No.	From (Page:Line)	Through (Page:Line)
PAC-45R	8:16	8:23
PAC-45R	9:1	9:3
PAC-45R	16:21	16:25
PAC-45R	17:1	17:2
PAC-45R	17:15	17:23
PAC-52R	4:22	4:29
PAC-52R	7:11	7:14
PAC-52R	8:1	8:7
PAC-52R	21:16	21:20
PAC-52R	24:6	24:8
PAC-52R GS 1	Entire Document	
PAC 55R	Entire Document	
PAC 55R	901	908
PAC 55R	909	909
PAC 46R	4:14	4:26
PAC 46R	18:25	19:3

C. Miscellaneous Objections

The Executive Director also makes the following miscellaneous objections:

Exhibit No.	From (Line:Page)	Through (Line:Page)	Basis for Objection
PAC-46R	17:10	17:11	Not supported by the evidence
PAC-52R	20:17	20:18	PAC has not identified what abrupt means nor has Stunz explained how he knows it would kill fish.
PAC-53R Remand	23:25	23:26	Mischaracterizes Ms. Cunningham's testimony. Ms. Cunningham did not "accept" POCCs pre-remand modeling; she performed a thorough review of the revised application before reaching her conclusion.

Exhibit No.	From (Line:Page)	Through (Line:Page)	Basis for Objection
PAC-53R Remand	24:16	24:18	Mischaracterizes Ms. Cunningham's testimony. Ms. Cunningham did not "acquiesce" to POCCs request; she performed an independent review of the additional information submitted by POCC to develop the mixing zones documented in her revised memo.
PAC-46 Remand	6:18	6:23	Mischaracterizes Ms. Cunningham's testimony. Ms. Cunningham did not decide her arithmetic was "close enough." Ms. Cunningham rounded her results according to TCEQ's normal practice.
PAC 60R	Entire Document	--	Relevance. The Texas Parks and Wildlife 2021 Stocking Report is not relevant to any of the issues the Commission Referred to SOAH.
PAC 61R	Entire Document	--	Relevance. The Fingerling stocking records are not relevant to any of the issues the Commission referred to SOAH.

Prayer

For the reasons stated above the Executive Director respectfully asks the Administrative Law Judges sustain the Executive Director's objections as noted above.

Respectfully submitted,

Texas Commission on Environmental Quality

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CERTIFICATE OF SERVICE

I certify that on the 2nd Day of March, 2022, the “Executive Director’s Objections to Prefiled Testimony” for TPDES Permit No. WQ005253000 was served electronically or via USPS to the persons on the attached Service list:



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